

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
EASTERN DIVISION**

JUAN MARTINEZ HERRERA,

Petitioner,

v.

SMITH CORRECTIONAL FACILITY,

Respondent.

No. ED CV 11-1464-JFW (PLA)

**ORDER TO SHOW CAUSE RE LACK OF  
EXHAUSTION**

On September 14, 2011, petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody under 28 U.S.C. § 2254 (the "Petition"), in which he challenges his 2005 conviction in the Riverside County Superior Court under California Penal Code §§ 148(a)(1), 269(a)(1), 288(a), 288(b)(1), and 647.6(a). (See Petition at 2). For the reasons expressed below, it appears that the instant Petition is unexhausted.

As a matter of comity, a federal court will not entertain a habeas corpus petition unless the petitioner has exhausted the available state judicial remedies on every ground presented in the petition. Rose v. Lundy, 455 U.S. 509, 518-22, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). The habeas statute explicitly provides that a habeas petition brought by a person in state custody "shall not be granted unless it appears that -- (A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant." 28

1 U.S.C. § 2254(b)(1). Moreover, if the exhaustion requirement is to be waived, it must be waived  
 2 expressly by the state, through counsel. See 28 U.S.C. § 2254(b)(3).

3 Exhaustion requires that petitioner's contentions be fairly presented to the state supreme  
 4 court even if that court's review is discretionary. O'Sullivan v. Boerckel, 526 U.S. 838, 845-47, 119  
 5 S.Ct. 1728, 144 L.Ed.2d 1 (1999); James v. Giles, 221 F.3d 1074, 1077, n.3 (9th Cir. 2000).  
 6 Petitioner must give the state courts "one full opportunity to resolve any constitutional issues by  
 7 invoking one complete round of the State's established appellate review process" in order to  
 8 exhaust his claims. O'Sullivan, 526 U.S. at 845. A claim has not been fairly presented unless the  
 9 prisoner has described in the state court proceedings both the operative facts and the federal legal  
 10 theory on which his claim is based. See Duncan v. Henry, 513 U.S. 364, 365-66, 115 S.Ct. 887,  
 11 130 L.Ed.2d 865 (1995); Picard v. Connor, 404 U.S. 270, 275-78, 92 S.Ct. 509, 30 L.Ed.2d 438  
 12 (1971); Johnson v. Zenon, 88 F.3d 828, 830 (9th Cir. 1996); Bland v. California Dep't of  
 13 Corrections, 20 F.3d 1469, 1473 (9th Cir. 1994), overruled on other grounds by Schell v. Witek,  
 14 218 F.3d 1017 (9th Cir. 2000). Petitioner has the burden of demonstrating that he has exhausted  
 15 available state remedies. See, e.g., Brown v. Cuyler, 669 F.2d 155, 158 (3d Cir. 1982).

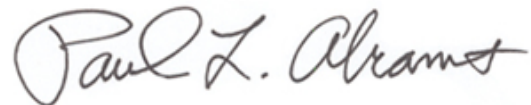
16 Here, it appears that petitioner has not exhausted his state judicial remedies in connection  
 17 with this matter. (See Petition at 3-5). Although petitioner states that he appealed his conviction  
 18 (see Petition at 3), the only information he provides about that appeal is his statement that he  
 19 appealed his conviction to the Riverside County Superior Court, and that the appeal was denied  
 20 on February 17, 2009. (Id.) Petitioner does not state that he has appealed his conviction to the  
 21 California Court of Appeal, or filed a Petition for Review with the California Supreme Court.  
 22 Further, he concedes that he has not filed any habeas petitions in state court with respect to the  
 23 subject judgment, as he "did not know about that." (Petition at 4-5). As the instant Petition  
 24 appears to be unexhausted, it is subject to being dismissed without prejudice. Greenawalt v.  
 25 Stewart, 105 F.3d 1268, 1271, 1273-75 (9th Cir. 1997).

26 Further, a petitioner seeking habeas corpus relief must name the state officer having  
 27 custody of him or her as the respondent to the Petition. See Rule 2(a), Rules Governing Section  
 28 2254 Cases in the United States District Courts. This person typically is the warden of the facility

1 in which the petitioner is incarcerated. Stanley v. California Supreme Court, 21 F.3d 359, 360 (9th  
 2 Cir. 1994); Brittingham v. United States, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam) (explaining  
 3 that a federal habeas petitioner's immediate custodian is the only party that can actually produce  
 4 "the body" of the petitioner); Dunne v. Henman, 875 F.2d 244, 249 (9th Cir. 1989) (holding that  
 5 where a prisoner files a § 2241 petition challenging the manner of execution of his sentence, the  
 6 "prisoner must name the warden of the penitentiary where he is confined as respondent"). See  
 7 also Ortiz-Sandoval v. Gomez, 81 F.3d 891, 895-96 (9th Cir. 1996), as amended (holding that  
 8 California Director of Corrections may, under certain circumstances, be properly named as a  
 9 respondent in a habeas action). Failure to name the correct respondent deprives federal courts  
 10 of personal jurisdiction. Stanley, 21 F.3d at 360; Dunne, 875 F.2d at 249. As the current petition  
 11 does not name the proper respondent for a habeas proceeding, this Court lacks jurisdiction to  
 12 entertain the action.

13 For the foregoing reasons, **no later than October 6, 2011**, petitioner is ordered to show  
 14 cause why the Petition should not be dismissed without prejudice for failure to exhaust state  
 15 remedies and for failure to name a proper respondent. Filing by petitioner of an Amended Petition  
 16 clearly showing that petitioner has exhausted his state judicial remedies and naming a proper  
 17 respondent shall be deemed compliance with this Order to Show Cause. **Petitioner is advised**  
 18 **that his failure to timely respond to this Order will result in the action being dismissed for**  
 19 **failure to prosecute and follow Court orders.**

20 The Court Clerk is directed to send petitioner a copy of his current Petition, together with  
 21 blank copies of the forms required when filing a Petition for Writ of Habeas Corpus by a Person  
 22 in State Custody. Any Amended Petition or other filing with the Court shall use the case number  
 23 assigned to this action.

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25 DATED: September 16, 2011

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PAUL L. ABRAMS  
 27 UNITED STATES MAGISTRATE JUDGE  
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